No. 16022

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Los Angeles Meat and Provision Drivers Union Local No. 626 of The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, *et al.*,

Appellants,

vs.

Lewis Food Company, a corporation,

Appellee.

APPELLANTS' REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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APPELLANTS' REPLY BRIEF.

Appellant Union desires to briefly respond to the contentions set forth in Respondent's brief.

Respondent contends that the National Labor Relations Board in 115 N. L. R. B. 890 has ruled that the lack of *bona fides* of the Lewis Employees Association does not constitute a defense to the §8(b)(4)(C) proceeding, the unfair labor practice counterpart to the instant case. We do not so construe that decision. The N.L.R.B. at the time of this decision, had not acted upon Case No. 21-CA-2061 (the Union unfair labor practice charge attacking the *bona fides* of the Association). The Board simply stated that the question of lack of *bona fides* of the Association could only be raised in an independent §8(a)(2) proceedings prosecuted by its General Counsel. Subsequently, a complaint was issued by him based on the

Union's charge and two other charges. This complaint specifically attacks the *bona fides* of the Association from its inception in 1952.

On June 11, 1956, the Union resumed picketing but despite the attempt of the Company to brand this activity as an §8(b)(4)(C) violation, *the general counsel now having taken the position that the Association was dominated and interfered with by the Company prior to and since it secured its certification, dismissed the Company's charges as to this picketing on merit.* [Tr. pp. 59-61.] This is true even though the *self same conduct* had been the basis of an §8(b)(4)(C) prosecution at a time *before* the General Counsel attacked the *bona fides* of the Association and its certification. Once having initiated a formal proceeding attacking the validity of the *Association from its inception,* the General Counsel has declined to proceed against the Union's resumption of picketing. In effect the Board's *present* position is that the Union's latest picketing is a protected protest over the Company's unfair labor practices.

As was stated in *Garner v. Teamsters,* 346 U. S. 485, 491:

> "The Federal Board, if it should find a violation of the National Labor Management Relations Act, would issue a cease and desist order and perhaps obtain a temporary injunction to preserve the *status quo.* Or if it found no violation, it would dismiss the complaint, *thereby sanctioning the picketing.*" (Emphasis added.)

Therefore it is submitted that the General Counsel now is attacking the validity of the certification in the only manner possible, an §8(a)(2) proceeding, and, if successful, the sole basis of the instant case will have disappeared.

The Board by its treatment of the economic activity which commenced June 11, 1956 has impliedly declared that picketing in the face of a certification *which at the time is under attack by the Board,* is not violative of §8(b)(4)-(C). Therefore, good logic compels the conclusion that the damage action counterpart should be at least held in abeyance until final Board action on the certification is known.

This clear situation is not affected by the cases cited on pages 7-10 of Respondent's brief. Those decisions in substance establish that where certifications *are lawfully obtained in the first instance,* the employer owes a duty to respect them by bargaining with the certified union for one year even though the union is not active during that period and even though it has lost the support of the employees. The reason for this principle is that good faith bargaining requires a reasonable trial period. However, this is a far cry from the instant case wherein the *Company allegedly has dominated and interfered with the Association in its formation and operation from its inception, having brought it into existence for the purpose of forestalling legitimate collective bargaining.*

Respondent contends the Company must honor the *certification* and therefore the Union is under the same obligation. This is totally inaccurate. *The fact is the Company is being prosecuted by the General Counsel for the very reason that it is recognizing the Association as bargaing agent of the employees.* If the General Counsel is successful in his prosecution, the Company will be ordered to disestablish or at a very minimum cease all dealings with the Association. Finally, if tomorrow the Company were to attempt to purge itself of the government's charges, it would at the very least be required to stop dealing with

the Association, or in effect *disregard the certification, the very thing the Union is facing damages for.*

Apparently the Union will not be able to defend the damage action by direct evidentiary attack upon the validity of the *certification,* this subject being solely within the Board's provinces. If the Union is forced to trial now, it apparently will be foreclosed from offering any evidence to the effect that the Company and Association fraudulently secured the *certification* by concealing the Company union character of the latter. Assuming, therefore, that after a substantial damage award has been granted against the Union, the Board rules that the certification was invalid from its inception, and should never have been issued, the Union will be penalized merely because of the premature trial of the action. On the other hand, if the action is abated until the Board has completed its proceedings, the Court will be in a position to know whether the *certification,* the sole basis of the damage action, was lawfully in effect at the time of the picketing. The Company, in such event will have suffered no damages because of the delay.

It is finally noted that, as the matter stands at present, the Board is treating the Union's activities of August—September, 1954 as prohibited and the self same activities since June, 1956 as protected. Respondent has alleged that *all* of the activities are violative of §303(a)(3). Until the Board clarifies this confusing circumstance, the instant damage action should be abated.

Respectfully submitted,

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